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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-999

ALAN J. DIXON, Treasurer of the State of Illinois, et al.,
Petitioners,

vs.

THE HONORABLE LATHAM CASTLE, Senior Circuit Judge, et al.,
Respondents.

Appeal from the Circuit Court of the United States Seventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Respondents Richard B. Ogilvie, Governor, John W. Lewis, Secretary of State, William J. Scott, Attorney General, and Victor L. Smith, individually and as members of the State Electoral Board of Illinois, oppose the Petition for Writ of Certiorari for the reasons which follow.

STATEMENT OF THE CASE

These Respondents disagree in part with Petitioners' Statement of the Case, both as to its editorial treatment of Petitioners' personal views and certain alleged facts which are in error.

There has been no finding or order of any court which would justify Petitioners' characterization of the September 21, 1971 decree as having "reversed" the 1965 consent decree entered without the benefit of current census data.

Petitioners state that five proposals for redistricting were presented, but Petitioners' own reference [A-4] [A-5] to the September 21, 1971 decree indicates that only four plans were before the court and that each district in the plans varied less than one percent from the ideal district population.

Petitioners proceed to state the case by establishing themselves as soothsayers, speculating that a certain proposed redistricting plan would have produced a political balance, which not only fails to be a "fact" but is not even germane to this appeal.

Finally, Petitioners erroneously allege restraint of Art. I §4 of the Constitution of the United States when in fact the injunction Petitioners refer to clearly states:

> . . . that once adopted said plan must govern the election of United States Representatives from Illinois *until the Illinois General Assembly does in fact timely adopt its own constitutional plan.* (emphasis added)

ARGUMENT

I.

The Issue Presented

Petitioners present only one very narrow issue to this Court, namely: should the Seventh Circuit Court have granted the extraordinary emergency relief sought by these Petitioners when hearings were being conducted as to certain Respondents' motion for injunctive relief?

Discretionary Writs of Mandamus and Prohibition were sought by Petitioners, together with an Emergency Application for Injunction, but the Seventh Circuit found "no merit to (the) suggestion that Judge Campbell was not required to convene a three-judge court. . . ." The Seventh Circuit in its discretion, (which Petitioners never allege was abused) denied the requested extraordinary writs of injunctive relief sought by Petitioners.

II.

Prior Conduct of Petitioners and Respondents

It must be noted that Petitioners, like some of the Respondents, are members of and constitute the State Electoral Board of Illinois and by operation of both the 1870 and 1970 Constitutions of Illinois the Attorney General of Illinois is *the* Constitutional legal officer who must represent such public officers in their *official* capacities or in the *Skolnick* matter here in question, only the Attorney General is authorized to represent the defendant Board. [See *Fergus* v. *Russel*, 270 Ill. 304 (1915) and Article V §15 Illinois Constitution (1970).]

During all hearings in conjunction with the redistricting order entered September 21, 1971 by the three-judge

District Court and prior thereto the Attorney General did represent the defendant State Electoral Board of Illinois. Prior to said hearings no member or members, Petitioners or Respondents, of said Board submitted proposals to the court to assist it in performing the task of Congressional redistricting. Counsel for these Petitioners did not attend the hearings conducted by the District Court on proposals submitted to it by Plaintiff and certain intervenors. Leave was granted to those interested persons who wished to support or oppose plans then being considered by the court, but during said hearings no member or members of said Board expressed their individual views as to what the court should do.

Subsequent to the September 21, 1971 redistricting order said defendant Board did not elect to appeal the decision of the three-judge court and no such appeal was authorized. Nor did these individual Petitioners ask the Attorney General to take an appeal of that decision.

III.

The Seventh Circuit Order

The Seventh Circuit told these Petitioners and their private attorney to seek their emergency and extraordinary relief in the Supreme Court of the United States, which they apparently did in *Dixon* v. *Skolnick*, Application No. A-578 to this Court, but which application was denied December 14, 1971. Petitioners now seem to want a second or third bite of the apple and ask this Court to order the Seventh Circuit to reconsider its denial of extraordinary and emergency relief. But to return this matter to the Seventh Circuit now would in effect be an order to the Seventh Circuit to render an advisory opinion upon a moot issue in conjunction with the Petitioners' request for

discretionary relief. Petitioners' request also would thrust both this Court and the Seventh Circuit into a political thicket unnecessary in law or in fact.

IV.

Prior Litigation and the Skolnick Decision

Unlike *Kirby v. Illinois Electoral Board*, 251 F. Supp. 908 (N.D. Ill. E.D. 1965) there were neither "opposing political factions of the State Electoral Board", nor a consent decree in *Skolnick v. Illinois Electoral Board*, No. 69 C 755 (N.D. Ill. E.D. 1971). In fact the Defendant Illinois Electoral Board in the *Skolnick* case was a nominal party and played a passive role in the case. Now Petitioners make the prognostication that a certain number of "safe" Republican districts are created by redistricting, but this cannot even be an issue when the nature of this Petition is considered, i.e., a review of the Seventh Circuit denial of extraordinary relief. It is just as likely that the new districts will produce an even split in party representation, but this is for the voters, not the courts to determine.

V.

The Three Judge Court

As to the collateral issue of whether three judges or one are required to determine statewide redistricting issues, these Respondents respectfully submit that this is in fact no issue at all. Every reported case in the federal courts which deals with statewide redistricting has been decided by a three-judge court. But even in the cases deciding issues totally unrelated to redistricting, the decision has never been that a three-judge order which should have been rendered by a single judge is void. Rather, such an order

is to be appealed, if at all, to the Circuit Court instead of the United States Supreme Court.

Petitioners themselves claim the 1965 *Kirby* case was a provisional decree resulting from a challenge to the 1961 Illinois redistricting statute, Ch. 46, § 156.f.1 Ill. Rev. Stat. (1963). It is totally illogical to contend that the proper convocation of the three-judge court in *Kirby* which declared the Illinois redistricting statute unconstitutional, must now be ignored and that the same three-judge panel must be denied authority to revise their decree in light of newly defined Constitutional standards. Even if the *Kirby* and *Skolnick* cases be treated as entirely independent of one another the fact remains that the *Kirby* decision replaced an Illinois statute, virtually to the same effect as if the State legislature had so acted. Thus, in this manner the *Skolnick* case represents a challenge to the judicial substitute for a state statute. The importance and magnitude of Congressional redistricting, together with the short time available from the taking of the census to creation of a new ten year plan, are also compelling reasons to continue three-judge court redistricting subject to direct United States Supreme Court review.

CONCLUSION

Petitioners have failed to present a substantial federal question and do not properly present an appeal on the merits. They ask this Court to decide whether the Seventh Circuit should have granted extraordinary relief, but the granting of such relief is discretionary and in this case, moot. Respondents respectfully urge that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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